

UNITED STATES BANKRUPTCY COURT

DISTRICT OF HAWAII

In re)	Case No. 97-03746
)	Chapter 11
UPLAND PARTNERS, a Hawaii limited)	
partnership,)	
)	
Debtor.)	
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**MEMORANDUM DECISION REGARDING
MOTION BY ELLIS TO AMEND ORDER ENTERED APRIL 9, 2002**

On April 18, 2002, William S. Ellis, Jr. filed a Motion by Ellis to Amend Order Entered April 9, 2002, Re Use of Cash Collateral ("Motion"). The Motion will be decided without a hearing. See LBR 1001-2(b); LR 7.2(d).

Pursuant to prior orders, the debtor sold certain real property and disbursed most of the proceeds to pay closing costs and certain secured claims. Approximately \$75,000 of proceeds remain in escrow at Fidelity National Title & Escrow of Hawaii, Inc. The order of April 9, 2002, directed that a portion of those proceeds be disbursed to the County of Maui in full or partial payment of real property taxes, and penalties and interest thereon, owed by Debtor to the County of Maui which became due before the petition date. Mr. Ellis argues that the authorization to pay pre-petition real property taxes was incorrect because, according to Mr. Ellis, (1) Trustee Richard Emery did not participate in the contested matter and thus "Trustee's burden of proof was not sustained on the issue of adequate protection of interests in the cash collateral[.]" Motion at 2, and (2) payment of this prepetition debt violates the automatic stay.

The Motion is not warranted by existing law or by any non-frivolous argument for the extension, modification, or reversal of existing law or the establishment of new law. See Fed. R. Bankr. P. 9011. The Motion must be denied for the following independently sufficient

reasons.

First, Mr. Ellis brings the motion under Fed. R. Civ. P. 59, made applicable by Fed. R. Bankr. P. 9023. Under Rule 59(e), the moving party must show that there has been (1) manifest error of law, (2) manifest error of fact, or (3) newly discovered evidence, In re Watson, 192 B.R. 739, 750 (Bankr. 9th Cir. 1996) (citations omitted), or an intervening change in controlling law. In re Arden Properties, Inc., 248 B.R. 164, 167 (Bankr. D. Ariz. 2000) (citing McDowell v. Calderon, 197 F.3d 1253, 1255 (9th Cir. 1999) (en banc)). Mr. Ellis fails completely to show how this standard is satisfied.

Second, Mr. Ellis lacks standing to make the arguments advanced in the Motion. “Adequate protection is only required when requested by a creditor who is entitled to receive it.” In re Cason, 190 B.R. 917, 928 (Bankr. N.D. Ala. 1995) (citations omitted); Matter of Southern Biotech, Inc., 37 B.R. 318, 323-24 (Bankr. M.D. Fla. 1983) (deciding that unsecured creditors with no vested interest in escrowed funds had no statutory right under 11 U.S.C. §§ 361 or 363 to adequate protection); see also 11 U.S.C. § 363(e) (requiring that adequate protection be provided “on request of an entity that has an interest in the property”). Mr. Ellis argues that the Trustee failed to carry his burden of proving that interests in the cash are adequately protected, but he has no interest in that cash collateral. (The only parties with interests in the cash collateral did not file motions to alter or amend the order). He argues that the disbursement violates the automatic stay, but the purpose of the automatic stay is to shield the debtor and the estate. In re Stringer, 847 F.2d 549, 551 (9th Cir. 1988). The automatic stay does not serve to protect Mr. Ellis, who is not the debtor nor even a creditor of the estate. See Seiko Epson Corp. v. Nu-Kote International, Inc., 190 F.3d 1360, 1364 (Fed. Cir. 1999) (holding that automatic stay

does not apply to nondebtor entities even if in similar legal or factual situation as debtor).

Third, the argument based on the Trustee's non-participation in the hearing is meritless. The proponent of the distribution is Quadrant Holdings Pty. Ltd. ("Quadrant"). Everyone acknowledges that Quadrant is the holder of a senior secured interest in certain real property of the estate. Quadrant established that the unpaid real property taxes (pre-petition as well as post-petition) are secured by a paramount lien on the Debtor's other real property. See Haw. Rev. Stat. § 246-55(a). The interest and penalties which are accruing on the pre-petition taxes are diminishing the value of the remaining property to the detriment of other secured and unsecured creditors. Prompt payment of the taxes, to the extent that funds are available for that purpose, is necessary to protect the interests of all concerned. Thus, Quadrant successfully carried the Trustee's burden. To say that the Motion must be denied because the Trustee did not offer the requisite showing, even though someone else did, would elevate form over substance.

Fourth, the argument that payment of the prepetition taxes violates the automatic stay is frivolous. It is well-settled that the automatic stay does not prevent creditors from seeking relief in the court where the bankruptcy case is pending. In re Roxford Foods, Inc., 12 F.3d 875, 878 (9th Cir. 1993); In re Teerlink Ranch Ltd., 886 F.2d 1233, 1237 (9th Cir. 1989); In re North Coast Village, Ltd., 135 B.R. 641 (Bankr. 9th Cir. 1992). Applying the stay to proceedings against the debtor in the home bankruptcy court would not serve the purposes underlying the stay and would not only be illogical but would lead to "absurd results." Id. at 643.

The Motion sets forth no clear error of law or fact, no newly discovered evidence and no intervening change in controlling law. Accordingly, the court will enter an order denying

the Motion by Ellis to Amend Order Entered April 9, 2002, Re Use of Cash Collateral.

Dated: Honolulu, Hawaii, _____.

Robert J. Faris
United States Bankruptcy Judge